No. 91-1389

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

HERBERT VIGIL, Petitioner

v.

HENRY SOLANO AND THE ATTORNEY GENERAL OF COLORADO, Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

1. Whether the Due Process Clause of the Fourteenth Amendment is violated when a state prosecutor's judgment as to *who* to prosecute is in reckless disregard for the evidence; even though not in retaliation for an accused exercising a right, or deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.

   Put in the context of this case: Is Due Process violated when a confessed *principal* to a crime against a local Sheriff and close friend *is not prosecuted* after probable cause is established; and the *accused is prosecuted* pursuant to a changed story by the principal, which is totally irreconcilable with independent evidence, after the principal receives immunity from prosecution?

Question Reserved But Not Relied On For Granting Certiorari

2. Does the communication in the presence of the jury about punishment during the course of a state criminal trial by a relative of the victim and local Sheriff raise a "presumption of prejudice" in violation of the Fourteenth Amendment right to an impartial jury?

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IN THE SUPREME COURT OF THE UNITED STATES

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HERBERT VIGIL, Petitioner,

v.

HENRY SOLANO AND
THE ATTORNEY GENERAL OF COLORADO,
Respondents.

The Petitioner, HERBERT VIGIL, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in the above-entitled proceeding on November 8, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit was not published and is reprinted in the appendix hereto, p. 19a infra.

The memorandum decision and Order of the United States District Court for the District of Colorado was not published and is reprinted in the appendix hereto, p. 15a infra. The Recommendation By The United States Magistrate Judge is reprinted in the appendix hereto, p. 7a infra.

The Order of the Colorado Supreme Court denying Certiorari is reprinted in the appendix hereto, p. 5a infra.

The opinion of the Colorado Court of Appeals was not published and is reprinted in the appendix hereto, p. 1a infra.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. Sec. 2254 the Petitioner brought a Petition for Writ of Habeas Corpus in the United States District Court for the District of Colorado from his conviction of First Degree Arson in the Costilla County District Court of Colorado. On May 28, 1991, the United States District Court for the District of Colorado dismissed the Writ of Habeas Corpus. Petitioner appealed this decision to the United States Court of Appeals for the Tenth Circuit who affirmed the judgment on November 8, 1991. No Petition for Rehearing was sought.

The jurisdiction of this Court to review the judgment of the Tenth Circuit is invoked under 28 U.S.C. Sec. 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

The following federal constitutional provisions are involved in this case:

a: Constitution of the United States, Amendment XIV:
"...No State shall...deprive any person of life, liberty, or property, without due process of law..."

b. Constitution of the United States, Amendment VI:
"In all criminal prosecutions, the accused shall enjoy the right to a speedy trial by an impartial jury of the State..."

STATEMENT OF THE CASE

This case is about "reckless state action" directed at one solitary citizen, **HERBERT VIGIL**, against which the Due Process Clause of the Fourteenth Amendment of our Constitution was

created to protect . It is July, 1987, in the small, predominantly Spanish town of San Luis, the oldest town in Colorado.

San Luis sits in south central Colorado where the rugged ranch land is bisected by many ditches, fences, and roads. It is the county seat of Costilla County and a place where "I know everybody and everybody knows me," according to one juror. At 11:15 p.m. on July 3, 1987, the Sheriff of Costilla County became the victim of an arson that destroyed his residence.

About 10:00 p.m. that evening the Sheriff investigated an incident resulting in the arrest of a relative of Dennis "Indio" Martinez, who attempted to prevent the arrest. Martinez left in a white Ford Falcon without being arrested himself for the interference.

William Gallegos was a very close, lifetime friend of the Sheriff but had recently developed a grudge against him because the Sheriff would not prosecute a case against Dennis Medina, whom Gallegos believed had burglarized his home in April, 1987. Gallegos also heard that the Sheriff had shot a couple of bystanders in the evening's earlier arrest incident who were cousins of Gallegos.

Sometime after 10:00 p.m. Gallegos and Martinez got together and planned to "get even" with the Sheriff by going to his home to burn it. In addition to revenge, Gallegos was also fueled with a lot of alcohol. He had been drinking heavily all that day, passed out a couple of times before the evening was over, and was in a dream-like state for much of the evening.

Gallegos admitted to being "totally drunk, maybe you were there and maybe you weren't, passing out and floating in and out of a dream-like state, a never-never land." He described his condition at trial:

> This was more like something that was happening far away, like sort of in a nightmare; something that you visualize part of what is happening, and

part of what is happening you don't visualize. That is something that you visualize far, far away.

After formulating the plan, Gallegos and Martinez each drove their respective vehicles to Vigil's place, Gallegos in his truck and Martinez in his white Ford; or, according to Gallegos, a black International. They siphoned gas from Vigil's car into two bottles and then went to the Sheriff's residence approximately 3.9 miles away and set the garage and house afire.

A short time after the fire was started, and by at least 11:30 p.m., Gallegos ended up at the Covered Wagon Bar in San Luis in the white Ford where Gallegos ran into Medina, who he thought had burglarized his home, and proceeded to sneak punch him in the face out of revenge. Gallegos then left the bar and passed out in the white Ford.

Gallegos was stopped the next morning, July 4, 1987, about 6:00 a.m. by a Colorado State patrolman in the white Ford and was arrested for DUI and taken to the San Luis jail. He remained there for at least 3 days and was then taken to the Alamosa County jail where he remained until July 21st. Martinez apparently fled the jurisdiction and was never apprehended.

Earlier that evening of July 3rd at about 7:00 p.m. Vigil arrived in Costilla County for a holiday get-together with relatives and friends. He had driven down with his family after work to his part-time home from his residence in Colorado Springs.

Vigil and the Sheriff were cousins and no motive was ever shown as to why Vigil would want to harm the Sheriff or his property. Vigil consistently denied to the Sheriff (in a statement without counsel after his arrest on July 25th) and to the jury (at trial) that he knew the gasoline was going to be used in an arson; that he knew anything of Gallegos' and Martinez's plans to commit arson; or that he gave them a ride or assisted them in any way with respect to the arson. Vigil said Gallegos and Martinez came over to his house in two vehicles about 10:30 p.m.: Gallegos' truck and Martinez's white car. Gallegos asked to borrow gas,

which Vigil thought was for Gallegos' truck, and about 20 minutes later Gallegos and Martinez both left in Martinez's white car. Vigil had at least two alibi witnesses to confirm he never left with Gallegos and Martinez from his place.

Three days after his arrest on July 7, 1987, while in the San Luis jail, Gallegos admitted to the Sheriff that he and Martinez had committed the arson. Gallegos admitted that he and Martinez "had set fire to Sheriff Pete Espinoza's residence...he accompanied Dennis Martinez to Herbert Vigil's house where he, Dennis Martinez, siphoned gas from Herbert Vigil's car into a number of bottles...he accompanied Dennis Martinez to Sheriff Espinosa's house where Mr. Martinez burned both the garage and home of Sheriff Espinoza." This formed the first part of the affidavit in support of the later arrest warrant of Vigil for the arson. (p. 23a infra)

During this interview on July 7th Gallegos did not implicate Vigil in any way as being involved in the arson as either a principal, an accessory before the fact, or an accessory after the fact. Gallegos said nothing more about Vigil for the next 13 days, as he languished in jail. The record is devoid of any other evidence coming forth connecting Vigil to the arson in any way. Nothing in the record shows that an Information was ever filed in Court against Gallegos for the arson.

On July 21, 1987, the prosecutor struck a deal with Gallegos while he was in jail in Alamosa. In essence it provided that in return for information regarding Vigil's activities in relation to the arson Gallegos would receive complete immunity from prosecution for the arson. (p. 29a infra)

Armed with this reprieve Gallegos came forth with an accusation against Vigil which formed the second part of the affidavit in support of the arrest warrant for Vigil. (pp. 25a & 26a infra) This statement was made to David Stong, the prosecutor's investigator.

Gallegos' new account was that when he and Martinez

went to Vigil's house on July 3rd they told "Mr. Vigil of their intentions to burn the residence of Sheriff Pete Espinoza, took gas with Mr. Vigil's permission from a vehicle owned by Mr. Vigil" and that "Mr. Vigil then gave both Mr. Martinez and Mr. Gallegos a ride to a point in the vicinity of the home of Pete Espinoza...knowing full well that the intention of Mr. Martinez and Mr. Gallegos was to burn the residence of Pete Espinoza." (pp. 25a & 26a infra)

Even if this story came from the lips of someone who was not totally drunk when the story unfolded, or who had not just been granted immunity from the same crime, *it could not have happened*: it was humanly impossible when taken in the light of the other independent evidence available to, and relied on by, the Sheriff and prosecutor. They knew, or should have known by reasonable inquiry, the following facts prior to arresting and charging Vigil with the arson: (1) The prosecutor stipulated that the arson was first reported at 11:15 p.m. (p. 35a infra) (2) Their own witness, Dennis Medina, testified that he saw Gallegos in the Covered Wagon Bar about 20 minutes after he arrived at 10:50 to 11:00 p.m. At least two other persons saw Gallegos in the Bar at this time, the bartender and Josito Espinosa. Medina got punched in the face by Gallegos a little later, about 11:30 to 11:40 p.m. (p. 44a infra) (3) After the fire was started Gallegos and Martinez walked and ran over roads and through irrigation fields and ditches to Martinez's house where Gallegos said Martinez had left the white Ford. (p. 45a infra) (4) It was 3.5 miles from the Sheriff's house to Martinez's house. (5) The Sheriff said it would take a man at least 55 minutes to walk that distance by road, and two hours through the fields. (p. 43a infra) (6) It was a 15 to 20 minute ride by car from Martinez's house to the Covered Wagon Bar. (p. 46a infra)

After the fire Gallegos would have taken at least 15 minutes to drive to the Covered Wagon Bar. This left *no time* to traverse 3.5 miles on foot through the rugged southern Colorado ranch land in darkness, while "totally drunk."

If the crime happened the way Gallegos said it did in his

second statement (and amplified by his testimony that the prosecutor should have known before arresting Vigil), then one or both of the two pillars of the prosecution case must fall as being false or impossible.

If it took Gallegos *at least one hour* conservatively to get from the arson scene to the white Ford to the Covered Wagon Bar, then either the prosecutor's stipulation of the time of the arson must be wrong as an hour too late, or the state witness Medina's testimony is false as an hour too early. If the prosecutor's stipulation and Medina's testimony are to be accepted as true, Vigil could not have driven Gallegos and Martinez to the Sheriff's house and left them without a car; they would have had to have driven the white Ford to the scene of the arson. Pure logic.

The record is clear that the prosecutor did not interview Vigil's alibi witnesses until the first day of trial. The trial judge found with respect to this point:

> ...voluntary statements made by the defendant on the day of his arrest clearly suggested alibi would be his defense and identified both of the witnesses in question. Certainly the prosecution could easily have talked to the potential witnesses long before requiring formal disclosure in this case.

A two-count Information was filed on July 23, 1987, charging Vigil with First Degree Arson and Conspiracy. (p. 31a infra) The conspiracy count did not even mention Gallegos as a co-conspirator. The Conspiracy count was eventually dismissed the first day of trial. Vigil was arrested in Colorado Springs on July 24th pursuant to the affidavit and on July 25th he asked to see the Sheriff, and without the assistance of counsel, after Miranda warnings were given, related his total denial of involvement.

To swallow Gallegos' fanciful and outrageous story, especially without interviewing Vigil and his alibi witnesses, and then to institute criminal proceedings against him was reckless and irrational conduct on the part of the prosecutor and

Sheriff.

Yet the prosecutor and Sheriff chose to believe this changed (and heavily influenced) story rather than Vigil's pure denial. In answer to *why*, the Sheriff said:

> Sir, Mr. Gallegos and myself, we have been, up to the day that my home was burned, William Gallegos and myself were the best of friends. (p. 43a infra)

During the noon recess on the second day of trial the jury was returning from their lunch break in San Luis and the members were standing in the hallway of the courthouse waiting for the courtroom to open. At this point a man in a black coat who "may have been intoxicated" was seen and heard talking to one member of the jury in the presence of other members of the jury. He was the Sheriff's uncle, known to the locals as Dr. Johnson. The communication included a statement about punishment of Vigil, said in Spanish which was later interpreted: "Vamos a castigarlo." — "We are going to punish him," or "We're going to get on with punishing him."

Vigil was convicted of First Degree Arson by this jury and on March 31, 1988, was sentenced to 8 years in prison. Gallegos was untouched by the criminal justice system. Martinez remains at large.

In a presentence Victim Impact Statement the Sheriff stated in response to a question about what conditions he would like the Court to impose:

> We will just let the court *punish* him as the court sees fit. I'm sure he will get the *punishment* he deserves. (p. 37a infra)

The record also shows that on the day Vigil was sentenced the Sheriff accosted Vigil on his way out of San Luis back to Colorado Springs after posting an appeal bond. The Sheriff apparently threatened Vigil with violence, as seen in a letter from

trial counsel to the trial judge. (p. 41a infra)

Vigil's trial counsel, Castelar Garcia, did not raise the constitutional issue of unfair prosecution at trial. Present counsel raised this issue of a federal constitutional violation in an appeal to the Colorado Court of Appeals. Although they said that Vigil's failure to raise this issue in the trial court resulted in a waiver of his challenge they held on the merits that Vigil could not prevail on a claim of selective prosecution because:

> ...defendant must show that the prosecutor exercised a policy of selectivity based on an unjustifiable standard such as race, religion, or any other arbitrary classification...No such showing has been made here.... (p. 1a infra)

This issue was subsequently argued by counsel for both Petitioner and Respondents and decided on its merits through the United States District Court for the District of Colorado and the United States Court of Appeals for the Tenth Circuit. Certiorari was simply denied by the Colorado Supreme Court although the issue was urged and argued by counsel herein. Under this Court's previous holdings, since the issue was presented to, and ruled on by, Colorado's highest court having jurisdiction to decide the issue, the federal question is properly before this court on Petition for Writ of Certiorari. *Charleston Federal Savings and Loan Association v. Alderson*, 324 U.S. 182 (1945); *Orr v. Orr*, 440 U.S. 268 (1979); *Whitney v. California*, 274 U.S. 357 (1927).

The Tenth Circuit rejected Vigil's federal question by essentially adopting the Magistrate Judge's Recommendation and the District Court's Order. They said: "No evidence exists showing Mr. Vigil was singled out for prosecution for impermissible considerations." (p. 19a infra)

The District Court also essentially adopted the Magistrate's Recommendation and held that *Wayte v. United States*, 470 U.S. 598 (1985) and other controlling case law requires dismissing Vigil's selective prosecution claim. (p.15a infra)

The Magistrate Judge found as follows on the issue:

> ...the state Court of Appeals held that petitioner failed to establish his selective prosecution and the undersigned agrees.
>
> In order to prevail on a charge of selective prosecution, petitioner must prove that he was singled out for prosecution while others similarly situated were not prosecuted.
>
> ...Because selective prosecution claims are judged by equal protection standards, petitioner must show his prosecution had a discriminatory effect and was motivated by a discriminatory purpose or intent.

Concluding that Vigil failed to meet either of the two prongs of the test the Magistrate recommended that the Petition for Writ of Habeas Corpus be dismissed and the Motion for Discovery be denied. (p. 15a infra)

REASONS FOR GRANTING WRIT

SUMMARY

This Writ of Certiorari should be granted for this Court to consider a constitutional question of importance in the administration of criminal justice that neither this Court nor the Circuit Courts have ever addressed directly.

The Due Process clause of the Fourteenth Amendment has not been applied with respect to an alleged violation of a state prosecutor's judgment as to *who* to prosecute where the prosecution is not instituted in either a retaliation for an accused exercising a statutory or constitutional right or in a discriminatory fashion based upon an unjustifiable standard such as race, religion, or other arbitrary classification.

This void raises important and unresolved problems involving the checks and balances of two branches of our government, and the constitutional rights of the least of our citizens to be protected from reckless state action in the filing of criminal charges; and deserves this Court's attention, guidance, and authoritative voice. An opinion herein will give guidance to the lower federal and state courts on the question.

UNRESOLVED PROBLEM

Constitutional challenges against prosecutorial actions and functions have been argued and decided by this Court and the Tenth Circuit in the past on due process grounds and equal protection grounds but not with respect to fact situations similar to those in the case at bar. The most common challenge (and the basis for the Tenth Circuit's decision herein) is the Equal Protection Clause violation by prosecutors where the prosecution is alleged to have singled out the accused from others similarly situated and where the selection was based on purposeful discrimination stemming from impermissible considerations such as race or religion. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Oyler v. Boles*, 368 U.S. 448 91962); *United States v. Amon*, 699 F.2d 1351 (10th Cir. 1981); *United States v. Salazar*, 720 F.2d 1482 (10th Cir. 1983); *Wayte v. United States*, 470 U.S. 598 (1985).

The Due Process Clause violation has been argued and decided by this Court and the Circuits with respect to other functions of the prosecutor or judge: a delay in the timing of the prosecution, *United States v. Marion*, 404 U.S. 307 (1971); *United States v. Lovasco*, 431 U.S. 783 (1978); "upping the ante" in retaliation for appealing a state criminal conviction or invoking the right to a jury trial, *Thigpen v. Roberts*, 468 U.S. 27 (1984), *Blackledge v. Perry*, 417 U.S. 21 (1974), *United States v. Goodwin*, 457 U.S. 368 (1982); threatening additional charges if the accused doesn't plead guilty during plea negotiation, *Bordenkircher v. Hayes*, 434 U.S. 357 (1978); and the imposition by a judge of a stiffer sentence after a reversal on appeal and the reconviction of an accused, *North Carolina v. Pearce*, 395 U.S. 711 (1969).

Vigil does not fit neatly into either type of constitutional challenge. He was neither discriminated against because of an

affiliation with a defined class, nor was he punished for a specific exercise of a statutory or constitutional right. Vigil's solitary cry is for a direct, simple infringement of his constitutional right to be free from an irrational exercise of a prosecutor's function of choosing who to prosecute.

Regarding the Equal Protection cases, it is Vigil's position before this Court that he does not fall into this category and his case should not be governed by the two prong test laid down therein. Just because Vigil does not fit within a definable class of persons wherein he is discriminated against should not rob him of the protective cloak of our constitution which insulates all its citizens from abuses of its government.

Does the Due Process Clause apply to a prosecutor's function of deciding who to prosecute if it is done without rational justification? No Circuit Court has addressed this precise question. This Court has not addressed this problem.

IMPORTANCE OF QUESTION

If this Court does not see the problem as important enough to hear argument on, it is unlikely that any of the Circuit Courts will feel inclined to address the issue. And if not now, when? This Court has not decided any cases since 1984 that deal with a claim of due process violation by a state prosecutor's actions. *Thigpen v. Roberts*, Supra (1984). Petitioner submits it is time for this Court to express its authoritative voice with respect to the limits of a state prosecutor's function of deciding who he may charge with a crime.

Needless to say this is a country where the three branches of its government are subject to a series of checks and balances from each other. Where are the "checks" if a state prosecutor is free to engage in an unreasonable and irrational choice of who stands accused, with their liberty at stake, and who goes untouched; to the extent that he effectively extinguishes the protection afforded by a jury trial and deprives a person of due process?

When does a fact situation cross the line into a violation of due process, the eternal question. Justice Frankfurter defined the elusive term *due process* eloquently and simply in *Rochin v.*

California, 342 U.S. 165 (1952):

> They are only instances of the general requirement that states in their prosecutions respect certain decencies of civilized conduct. Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend 'a sense of justice'.

Can we find a better expression for *due process*? This case fits the above definition because, of the three versions of the crime available to the prosecution, two showed Vigil had no involvement whatsoever with the crime, and the one version implicating Vigil was humanly impossible within the parameters of the other independent evidence readily available to, and relied on by, the prosecutor. The three versions were Gallegos' two statements and Vigil's statement. There was no other independent evidence of who committed the arson.

That the methods used by the state in this case 'offend a sense of justice' was ironically expressed by the very judge who imposed sentence on Vigil to 8 years in prison:

> "This case is difficult because of the status of Mr. Gallegos and I know that there are those and, indeed, there will be those after today who will say there is, no matter what I do to you, no justice in Willy Gallegos walking with no charge, no punishment, and you incarcerated. Sometimes that's difficult for a defendant to put into perspective. Sometimes it's difficult for me to put into perspective.
>
> In other words, I will sentence you for what you were convicted of and try and do justice in your case, while perhaps agreeing with Mr. Garcia that what happened to Mr. Gallegos does not necessarily do justice to him or to this community..."

The effect of a silent voice on this problem, in relation to the public consciousness and perception, is well summed up by trial counsel's plea for leniency at sentencing.

> "The message that came out of this trial was not that if you mess around with the Sheriff, you're going to get convicted. The message that came out is if you know the right people, you won't get convicted. They'll give you a free ride."

MERITS OF QUESTION

If Certiorari is granted, Petitioner will be able to establish that the prosecutor's actions in charging Vigil amounted to "reckless disregard for the evidence" and "irrational state action" and would justify a reversal of his conviction; especially in light of the reserved question of a violation of his right to an impartial jury.

The conflict of interest in the prosecutorial decision making process in this case is massive. The victim was the Sheriff and chief law enforcement agent of the prosecutor in San Luis, Colorado. The Sheriff was the lead investigator in this case. The Sheriff was a life long close friend of Gallegos who admitted he was the arsonist four days after the crime and was never prosecuted.

The record discloses several material propositions: 1) after the State obtained all the evidence to establish probable cause and guilt beyond a reasonable doubt against Gallegos, it refused to prosecute him; 2) this refusal prejudiced Vigil; 3) Vigil was not implicated by anyone except Gallegos and then only after Gallegos sat in jail for 18 days and was granted complete immunity from prosecution; 4) Gallegos' changed story implicating Vigil was totally irreconcilable with the other independent evidence of the arson relied on by the prosecutor; 5) The State's refusal to prosecute Gallegos was unjustifiable, unnecessary, and unreasonable. Discovery on this point was denied by the United States District Court.

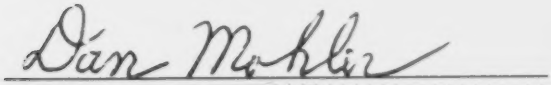
To charge Vigil with the arson under these circumstances by direct information violated all principles of government

conflicts of interest, fairness, and the Due Process Clause of the Fourteenth Amendment.

CONCLUSION

For the reasons enumerated above this Petition for Certiorari should be granted. Herbert Vigil deserves it, and the Community of San Luis, Colorado deserves it.

Respectfully submitted,



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APPENDIX

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COLORADO COURT OF APPEALS

No. 88CA0713

THE PEOPLE OF THE STATE OF COLORADO	)	
	)	NOT
	)	SELECTED
Plaintiff-Appellee,	)	FOR
	)	PUBLICATION
v.	)	
	)	JUDGMENT
HERBERT VIGIL,	)	ENTERED ON
	)	JUNE 29, 1989
Defendant-Appellant.	)	

Appeal from the District Court of
Costilla County
No. 87CR7

Honorable O. John Kuenhold, Judge

DIVISION C JUDGMENT AFFIRMED
Opinion by JUDGE STERNBERG
Fischbach and Van Cise*, JJ., concur

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*Sitting by assignment of the Chief Justice under provisions of the Colo. Const., art. VI, Sec. 5(3), and Sec. 24-51-1105, C.R.S. (1988 Repl. Vol. 10B)

Defendant, Herbert Vigil, appeals the judgment of conviction entered on a jury verdict finding him guilty of first degree arson. He contends the court's refusal to grant his motion for mistrial based on extraneous communication between a member of the jury and a relative of the victim denied him the right to a trial by an impartial jury. Defendant also maintains he was denied equal protection of the law as the result of selective prosecution. We affirm.

The charge against defendant was filed as the result of arson at the home of the Costilla County Sheriff. The prosecution's evidence established that two men went to defendant's home, and with defendant's assistance siphoned gasoline out of defendant's car. Defendant then drove the two men to a home less than one-quarter of a mile from the sheriff's house. The men left Defendant's car, walked to the sheriff's house, and using the gasoline siphoned from defendant's car set the structure on fire. One of the men was granted immunity from prosecution in return for his testimony at defendant's trial, and the other man, who fled the jurisdiction, was never apprehended.

Defendant testified in his own behalf. He stated that the two men came to his house for gasoline, but denied knowing that the gasoline would be used to set a fire. Defendant also denied driving the men to the location near the sheriff's home.

Defendant first maintains that the court erred in denying his motion for mistrial based on extraneous communication between a member of the victim's family and a member of the jury. We find no error.

Following a lunch recess, a defense witness observed the sheriff's uncle conversing with one of the jurors. She overheard one of the men say to the other in Spanish, "[W]e are going to crucify him." The juror who was seen talking to the Sheriff's uncle was questioned in camera about the incident, and although he denied conversing with the victim's uncle, the juror was nevertheless excused from further service. The remaining members of the panel were then questioned separately, and each juror responded that he or she had not heard the conversation or did not speak Spanish and, therefore, could not understand what had transpired between the two men. Defendant moved for a mistrial, but based on the responses to the court's inquiries the

motion was denied.

In order to prevail on a claim that exposure to extraneous information influenced a jury, defendant bears the burden of proving that he was prejudiced as a result of the information. *People v. Harrison*, 746 P.2d 66 (Colo. App. 1987). Prejudice will not be presumed merely on a showing of improper communication with a juror, *People v. Hickam*, 684 P.2d 228 (Colo. 1984), but may be demonstrated by facts suggesting there is a reasonable possibility that the outside information might affect the verdict. See *Wiser v. People*, 732 P.2d 1139 (Colo. 1987).

The determination of whether prejudice has resulted so as to warrant the declaration of a mistrial rests in the discretion of the trial court, *People v. Moore*, 701 P.2d 1249 (Colo. App. 1985), who may examine the information itself in order to ascertain whether it has the capacity to influence the verdict. *People v. Staggs*, 740 P.2d 21 (Colo. App. 1987).

Contrary to defendant's contention, the record is devoid of evidence to suggest that the remaining jury members were influenced by the conversation between the Sheriff's uncle and the discharged juror. The responses of the jury members to the court's inquiries give no indication that their ability to assess the case impartially was tainted. Although a juror's assurances that he or she can be fair and impartial are not necessarily dispositive, the record supports the trial court's determination that the jurors would be able to render an impartial verdict based only on the evidence introduced at trial and the court's instructions. See *People v. Wiedemer*, 641 P.2d 289 (Colo. App. 1981).

Furthermore, using the objective standard set forth in *Wiser v. People*, supra, we agree with the trial court's conclusion that there was no reasonable possibility that the extraneous communication affected the fairness of defendant's trial. Defendant did not meet his burden of demonstrating that the panel was exposed to the content of the conversation and that the exposure resulted in prejudice to him. Therefore, there are no facts suggesting a reasonable possibility that the conversation affected the verdict. Accordingly, we find no abuse of discretion in the court's denial of the motion for mistrial.

We find no merit in Defendant's contention, raised for the first time on appeal, that he was denied his right to equal

protection as a result of selective prosecution. Defendant's failure to raise this issue in the trial court resulted in a waiver of his challenge. See Crim. P. 12(b)(2).

Furthermore, in order to prevail on a claim of selective prosecution, defendant must show that the prosecutor exercised a policy of selectivity based on an unjustifiable standard such as race, religion, or any other arbitrary classification. *People v. McFarland*, 189 Colo. 363., 540 P.2d 1073 (1975). No such showing has been made here.

Judgment affirmed.

JUDGE FISCHBACH and JUDGE VAN CISE concur.

SUPREME COURT, STATE OF COLORADO
Case No. 89SC446
Certiorari to the Colorado Court of Appeals
88CA0713
Costilla County District Court 87CR7

ORDER OF COURT

HERBERT VIGIL,

Petitioner,

v.

THE PEOPLE OF THE STATE OF COLORADO,

Respondent,

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after a review of the record, the briefs, and the opinion of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, **DENIED.**

BY THE COURT, EN BANC, NOVEMBER 13, 1989.

CC: James G. Benway, Clerk
Colorado Court of Appeals

Dan Mohler, P.C.
Dan Mohler
108 E. Cheyenne Road
Colorado Springs, CO 80906

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 89-C-2115

HERBERT VIGIL,

Petitioner,

v.

HENRY SOLANO and the ATTORNEY GENERAL OF COLORADO,

Respondents.

Dated April 17, 1991

RECOMMENDATION BY
UNITED STATES MAGISTRATE JUDGE

Petitioner Herbert Vigil, by counsel Dan Mohler, initiated this action by filing a petition for a writ of habeas corpus pursuant to 28 U.S.C. Sec. 2254. It is claimed that petitioner's constitutional rights were violated by his selective prosecution and the misconduct of a juror. Petitioner also filed a motion for an order allowing discovery on the issue of the state's decision to prosecute only him. Pursuant to Rule 605 of the local Rules of Practice of the United States District Court for the District of Colorado, the matter was referred to Magistrate Judge Hilbert Schauer. Having considered the pleadings, state court records and oral arguments on the motion for discovery, the Magistrate Judge hereby enters the following recommendation.

Petitioner is presently on bond having been convicted on March 31, 1988 of First Degree Arson and sentenced to eight years in the Department of Correction. Petitioner is, therefore, in constructive custody. *Hensley v. Municipal Court*, 411 U.S. 345 (1973). He has also exhausted state remedies, having

unsuccessfully appealed these issues to the Colorado Court of Appeals and the Colorado Supreme Court.

Petitioner's first allegation is that his rights to an impartial jury trial and due process of law, as guaranteed by the Fifth and Sixth Amendments, were violated by a communication between a juror (Mr. Velasquez) and a relative of the victim. It is alleged that during recess on the second day of the trial, Mr. Velasquez, who was ultimately excused, was involved in a conversation with the victim's uncle within hearing of a juror (Mr. Vialpando) who was not excused. With regards to the incident, the Colorado Court of Appeals made the following findings of fact which accurately reflect the record:

> Following a lunch recess, a defense witness observed the [victim's] uncle conversing with one of the jurors. She overheard one of the men say to the other in Spanish, '[W]e are going to crucify him.' The juror who was seen talking to the [victim's] uncle was questioned in camera about the incident, and although he denied conversing with the victim's uncle, the juror was nevertheless excused from further service. The remaining members of the panel were then questioned separately, and each juror responded that he or she did not speak Spanish and, therefore, could not understand what had transpired between the two men. Defendant moved for a mistrial, but based on the responses to the court's inquires the motion was denied.

People v. Vigil, No. 88CA0713, slip op. at 2 (Colo. App. June 29, 1989).

In addition to the motion for a mistrial, petitioner filed a motion for a new trial based on newly discovered evidence that Mr. Vialpando may have overheard the communication. That motion was denied following a hearing, the trial court finding no clear evidence Mr. Vialpando overheard the remark. Applying the lesser standard found in *Wiser v. Colorado*, 732 P.2d 1139 (Colo. 1989) (as opposed to the showing of actual prejudice mandated by *People v. Garcia*, 752 P.2d 570 (Colo. 1988), the court

found "it impossible to conclude that there is a reasonable possibility that extraneous information or influence affected the verdict." (Transcript vol. III, hearing on motion for new trial, at 21; transcript volumes are referenced according to the typed volume numbers, not handwritten numbers.) In a similar fashion, the Court of Appeals affirmed the judgment finding the record devoid of evidence the jurors were influenced by the conversation and no reasonable probability the extraneous communication affected the fairness of the trail as required by *Wiser*. No. 88CA0713, slip op. at 3.

In a criminal case, any private communication with a juror during trial about the matter pending before the jury is deemed presumptively prejudicial. *Remmer v. United States*, 347 U.S. 227, 229 (1954). The burden rests on the government to establish after hearing and notice that such contact was harmless. 347 U.S. at 229. In a hearing with all parties present, the trial court should determine the circumstances, impact on the juror, and whether or not the communication was prejudicial. *United States v. Gigax*, 605 F.2d 507, 515 (10th Cir. 1979). It is noted however, in *Rushen v. Spain*, 464 U.S. 114 (1983), the court recognized that an ex parte communication with a juror may be harmless. "[T]he constitution does not require a new trial every time a juror has been placed in a potentially compromising situation...[because] it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote." 464 U.S. at 118 (quoting *Smith v. Phillips*, 455 U.S. 209, 217 (1982).

In the present case, the trial court conducted a *Remmer* - type in camera hearing during the trial after a witness reported overhearing the ex parte communication. Two witnesses and Mr. Velasquez were examined by all parties and Mr. Velasquez was excused. Each juror was polled separately and each stated he or she did not hear the communication. (Vol. II at 163-85). Petitioner then moved for a mistrial, stating "its just a feeling" when the court asked if he was dissatisfied with the jurors' responses. (Vol. II at 186).

The trial court's decision as to how to proceed in response to allegations of juror misconduct will not be reversed except for abuse of discretion. *United States v. Bradshaw*, 787 F.2d 1385 (10th Cir. 1986); *United States v. Day*, 830 F.2d 1099, 1106 (10th Cir.

1987). "Whether a motion for a mistrial should be granted is within the discretion of the trial judge because he is in the best position to evaluate the effect of the offending evidence on the jury." 830 F.2d at 1106 (quoting *United States v. Laymon*, 621 F.2d 1051, 1053 (10th Cir. 1980). Cf. *United States v. Washita Construction Co.*, 789 F.2d 809, 821 (10th Cir. 1986) (outcome of trial not affected where juror involved in ex parte communication was dismissed). The record shows that the offending juror was excused and there was no evidence that any other juror heard the ex parte communication. It was, therefore, not an abuse of discretion for the court to deny the motion.

The court also denied the motion for a new trial because Mr. Velasquez had been excused and none of the other jurors heard the communication. Specifically, the court found that Mr. Vialpando stated that he did not hear the conversation and that he would serve fairly and impartially. The court further found that were it to assume "for purposes of this motion" that he heard the conversation, "we presume jurors perform their duties faithfully." (Vol. III at 21). "Surmise and suspicion may not be used to assail the integrity of a jury; it is presumed that jurors will be true to their oath and will conscientiously observe the instructions and admonitions of the court." *United States v. Gigax*, 605 F.2d 507, 515 (10th Cir. 1979) (quoting *Baker v. Hudspeth*, 129 F.2d 779 (10th Cir. 1942). See also *United States v. Radetsky*, 535 F.2d 566, 570 (10th Cir. 1976) (where judge questioned all potential jurors and ascertained that they would be impartial, procedure met the standards for a fair trial); *United States v. Jones*, 707 F.2d 1169, 1173 (10th Cir. 1983), cert. denied, 464 U.S. 859 (1983) (something more than "unverified conjecture" needed where only potentially suspicious circumstances are shown).

Factual findings arising out of state court proceedings are entitled to a presumption of correctness. *Rushen v. Spain*, 464 U.S. 114, 120 (1983) (applicable to state-court determination that a juror's deliberations were not affected by ex parte communications); *Patton v. Yount*, 467 U.S. 1025, 1036-38 (1984) (trial court in best position to identify bias based on credibility or demeanor). See also *Barton v. Malley*, 626 F.2d 151, 156 (10th Cir. 1980) Johnston v. Makowski, 823 F.2d 387, 391 (10th Cir. 1987), cert denied, 484 U.S. 1026 (1988). The Court of Appeals found,

and the magistrate judge agrees, that the record fairly supports the trial court's determination that the jurors would be able to render an impartial verdict based only on the evidence and the court's instructions. Unlike the jurors in *Remmer* and *Rushen*, the offending juror did not sit on the jury so that any possible prejudice was cured. The trial court ascertained that the remaining jurors did not hear the communication and would be impartial. There was no evidence to the contrary. Under the circumstances, petitioner's allegation that he was prejudiced by juror misconduct is without merit.

Petitioner's remaining allegation is that his constitutional right to equal protection was violated by his selective prosecution. Such a claim is properly raised in a motion to the court before trial under Colo. R. Crim. Pro. 12(b)(2), and petitioner's failure to do so constitutes a waiver of that objection unless good cause is shown. Nonetheless, the state Court of Appeals held that petitioner failed to establish his selective prosecution and the undersigned agrees.

In order to prevail on a charge of selective prosecution, petitioner must prove that he was singled out for prosecution while others similarly situated were not prosecuted. *United States v. Salazar*, 720 F.2d 1482, 1487 (10th Cir. 1983), cert. denied, 469 U.S. 1110 (1985). "[T]he conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation' so long as 'the selection was [not] deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification'." *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (quoting *Oyler v. Boyles*, 368 U.S. 448, 456 (1961); *Wayte v. United States*, 470 U.S. 598, 608 (1985). Because selective prosecution claims are judged by equal protection standards, petitioner must show his prosecution had a discriminatory effect and was motivated by a discriminatory purpose or intent. 470 U.S. at 608.

The government retains "broad discretion" as to whom to prosecute. *Wyate*, 470 U.S. at 607. "'[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file...generally rests entirely in his discretion.'" 470 U.S. at 607 (quoting *Bordenkircher v. Hayes*, 434 U.S. at 364). "There is a presumption that prosecution for

violation of the criminal law is in good faith." *United States v. Bennett*, 539 F.2d 45, 54 (10th Cir. 1976), cert denied, 429 U.S. 925 (1976). Moreover, "[t]he purpose of the grant of immunity is to reach the truth, and...[a] defendant has no standing to contest the propriety of the grant of immunity to a witness." *United States v. Trammel*, 583 F.2nd 1166, 1168 (10th Cir. 1978).

Under *Barton v. Malley*, 636 F.2d 151, 155 (10th cir. 1980), the petitioner must show by a preponderance of the evidence that 1) others similarly situated have not been prosecuted, and 2) his selection was based on intentional, purposeful discrimination stemming from impermissible considerations such as race, religion, or the desire to prevent the exercise of other constitutional rights. See also *United States v. Amon*, 669 F.2d 1351, 1356 (10th Cir. 1981), cert. denied, 459 U.S. 825 (1982); *United States v. Salazar*, 720 F.2d at 1487.

With regard to the first prong, petitioner argues that the other participants were not prosecuted. He claims that the participant who was granted immunity is a close friend of the victim, (complaint, p.6(b)), but fails to mention he is the victim's cousin. (Vol. III, hearing on motion to suppress, at 25). Although the participant who fled was never apprehended, there is no evidence he would not have been prosecuted as well. Further, under *Trammel*, he may not contest the grant of immunity to a co-defendant. Even if we were to assume the first prong is satisfied, petitioner has not shown discriminatory purpose or intent. He does not claim and the facts do not show that he is a member of any identifiable group or that he was prosecuted because of his race, religion or the exercise of a constitutional right such as free speech. Under the circumstances, petitioner's claim of selective prosecution is without merit.

In conjunction with his claim of selective prosecution, petitioner filed a motion for an order allowing discovery. Under Rule 6, discovery is allowed in habeas corpus cases for "good cause shown." Since petitioner has failed to make the requisite showing for a claim of selective prosecution, good cause does not exist for discovery.

IT IS THEREFORE RECOMMENDED that the motion be denied.

IT IS FURTHER CONCLUDED based upon a full analysis

of the two claims presented in the petition for writ of habeas corpus that the claims are without merit and,

IT IS RECOMMENDED that the petition be dismissed.

DATED at Denver, Colorado, this 17th day of April, 1991.

BY THE COURT:

_____

Hilbert Schauer
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CASE NO. 89-C-2115

HERBERT VIGIL,

Plaintiff,

v.

HENRY SOLANO AND THE ATTORNEY GENERAL OF COLORADO,

Defendants.

Dated May 28, 1991

ORDER

CARRIGAN, J.

Petitioner Herbert Vigil commenced this action under 28 U.S.C. Sec. 2254 seeking a writ of habeas corpus. Petitioner asserts: (1) that juror misconduct at his state trial denied him due process and his right to an impartial jury as guaranteed by the Fifth and Sixth Amendments to the United States Constitution; and (2) that his right to equal protection was violated by a selective prosecution. Petitioner has filed a motion for an order allowing discovery on the latter claim.

Pursuant to D.CO.LR 605, this case was referred to Magistrate Judge Hilbert Schauer, who has reviewed the matter and prepared a recommendation. The Magistrate Judge recommends that the petition be dismissed and that the motion for an order allowing discovery be denied. Copies of both the recommendation and D.CO.LR. 605 were mailed to the petitioner's attorney on April 17, 1991. On May 6, 1991, the Petitioner filed objections to the Magistrate Judge's recommendation.

I have carefully reviewed the entire file, the Magistrate Judge's recommendation and the petitioner's objections. In his objections, the petitioner first argues that juror prejudice was shown at trial and that the government did not, as required, overcome the presumption of unfair prejudice. That argument is without merit. Petitioner's brief notably lacks citation to any authority demonstrating any defect in the detailed procedure used to assess juror bias, as prescribed by *Remmer v. United States*, 347 U.S. 227 (1954) and its progeny, and employed by the state trial court in the Petitioner's case. My review of the facts and law convinces me that the conclusions of both the state courts and the Magistrate Judge are correct that no juror bias existed.

Petitioner's second and third arguments are interrelated and, I conclude, must be overruled. As to his selective prosecution claim, the petitioner, relying on *Falk v. United States*, 479 F.2d 616 (7th Cir. 1973), asserts that the Magistrate Judge failed to apply "the better reasoned case law on point." (objections, p.4). The case cited, however, lends no support to the petitioner's argument. In his objections, the petitioner has ignored *Wayte v. United States*, 470 U.S. 598 (1985) and other controlling case law that requires dismissing his selective prosecution claim.

Finally, the Magistrate Judge has recommended denying the motion for an order allowing discovery on the selective prosecution claim because the petitioner has failed to demonstrate good cause for discovery. Because the selective prosecution claim must be dismissed in any event, the petitioner's discovery motion is moot and must be denied.

Accordingly, IT IS ORDERED that:

(1) the Magistrate Judge's recommendation is adopted as the order of this court;

(2) the petitioner's objections to the Magistrate Judge's recommendation are overruled;

(4) the petition for writ of habeas corpus is dismissed with prejudice; and

(3) the petitioner's motion for an order allowing discovery is denied as moot.

Dated at Denver, Colorado May 28, 1991.

BY THE COURT:

_____

Jim R. Carrigan
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

HERBERT VIGIL,	)	Filed United States
	)	Court of Appeals
Petitioner-Appellant,	)	Tenth Circuit
	)	November 8, 1991
v.	)	Robert L. Hoecker,
	)	Clerk
HENRY SOLANO; ATTORNEY GENERAL FOR THE STATE OF COLORADO,	)	No. 91-1234
	)	(D.C. No.89-C-2115)
	)	(D. Colo.)
Respondents-Appellees.	)	

ORDER AND JUDGMENT*

Before ANDERSON, TACHA, and BRORBY, Circuit Judges

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9 The cause is therefore ordered submitted without oral argument.

Mr. Vigil appeals the dismissal of his habeas petition.

Mr. Vigil was convicted of first degree arson in state court as a result of his role in setting fire to the home of the sheriff.

Mr. Vigil exhausted his state remedies and filed his petition

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

for habeas relief in the United States District Court. In his habeas petition, Mr. Vigil asserted two constitutional errors relating to his state court conviction: (1) alleged prejudicial communication to a juror; and (2) selective and discriminatory prosecution. Three people, including Mr. Vigil, were involved in the arson of the sheriff's home. One (a close friend of the sheriff) was granted immunity and in turn testified against Mr. Vigil. It should be noted that Mr. Vigil is the sheriff's cousin. The other participant fled and was never apprehended. During Mr. Vigil's trial, the sheriff's uncle was seen conversing with one of the jurors.

The district court referred the matter to a magistrate judge who filed an eight-page Recommendation concluding the habeas petition lacked merit and should be dismissed. Objections were filed and the district judge considered the objections and dismissed the petition concluding (1) no juror bias had been demonstrated in view of the fact that the juror involved had been excused and the remaining panel members had been interrogated and could not have overheard or understood the conversation; and (2) no discriminatory purpose or intent was shown to support the claim of selective prosecution.

On appeal, Mr. Vigil asserts error in that: (1) the comments made by the sheriff's uncle "cannot be found beyond a reasonable doubt to have not contributed to Vigil's guilty verdict; especially in light of the relative weakness of the government's case"; and (2) while he concedes he has not proven the legal requirements of discriminatory purpose or intent, he makes an impassioned plea arguing that as the two primary culprits escaped prosecution, it is not right or fair that he, as a less culpable participant, should be prosecuted, and he asks we make a special exception due to the unique circumstances of this case.

Although one juror was arguably exposed to improper extraneous influence, the trail judge dismissed that juror upon learning of the impropriety and conducted an examination of the remaining jurors who might have been exposed to the communication and determined, as a matter of fact, they were not exposed to any prejudicial influence.

Mr. Vigil's two accomplices were not prosecuted; one was given immunity in return for his testimony and the other fled and has never been apprehended. No evidence exists showing Mr.

Vigil was singled out for prosecution for impermissible considerations.

No reason exists for us to repeat all the facts or the law as they have been properly set forth in the magistrate judge's Recommendation of April 17, 1991, and the district court's Order of May 28, 1991, both of which are attached hereto.

Mr. Vigil has failed to persuade us of any error committed by the United States District Court and we AFFIRM this judgment for substantially the same reasons set forth in the attached Recommendation and Order. The mandate shall issue forthwith.

ENTERED FOR THE COURT:

WADE BRORBY
Circuit Judge

COUNTY/DISTRICT COURT
COUNTY OF COSTILLA
STATE OF COLORADO

Criminal Action No. 87FC21

(Seal)
Office of the District Attorney
12th Judicial District

AFFIDAVIT AND APPLICATION FOR ARREST WARRANT

THE PEOPLE OF THE STATE OF COLORADO,

vs.

HERBERT VIGIL

Defendant(s)

Filed in County Court
Costilla County, Colorado
Amadeo G. Martinez, Clerk
JUL 23 1987

David D. Stong The Affiant, being first duly sworn, upon oath deposes and says:

1. That Affiant has read the criminal Complaint/Information herein filed against the above-named defendant(s), hereby made a part of this affidavit by reference, that he knows the allegations therein contained, and the same are true to the best of his knowledge, information and belief that said defendant(s) committed the offense(s) in said Complaint/Information.

2. That the facts known to Affiant which establish probable cause to believe (1) that said criminal offense was committed, and (2) that said offense was committed by the above named defendant(s), are the following:

3. That on July 3, 1987, at approximately 2330 hours, your affiant met with Costilla County Sheriff Pete Espinoza and learned the following:

4. That on July 3, 1987, at approximately 9:30 p.m., Sheriff Espinoza was called to the residence of Ben Quintana, to investigate a possible complaint of felony menacing against Harry Martinez.

5. That upon arrival, Sheriff Espinoza talked to Ben Quintana who told him that earlier that evening a man known to him as Harry Martinez had threatened to kill him by placing a gun at his head while stating he was going to kill him and furthermore had fired shots in Mr. Quintana's general direction.

6. That upon Mr. Quintana's complaint, Sheriff Espinoza subsequently arrested Harry Martinez on July 3, 1987 at approximately 10:00 p.m. on Torcido Road, Town of San Francisco, State of Colorado.

7. That at the time of Harry Martinez's arrest, a man known to Sheriff Espinoza as Dennis Martinez attempted to prevent the officers involved from arresting Dennis Martinez.

8. A scuffle ensued with anumber of officers and Dennis Martinez in which Mr. Martinez was physically subdued and as a result of which a number of threats were made by Dennis Martinez against the officers involved.

9. That by information and belief, Sheriff Espinoza believed Dennis Martinez to be driving a white 1968 Ford four door automobile during the time in question.

10. That at approximately 11:15 p.m. on July 3, 1987, Sheriff Pete Espinoza's residence in the Town of San Pablo, County of Costilla, State of Colorado, was destroyed by fire, a suspected arson.

11. That Sheriff Espinoza was advised by James J. Harper, patrolman for the Colorado State Patrol that on July 4, 1987, at approximately 6:00 a.m. Patrolman Harper stopped the vehicle described above, which vehicle was driven by a William Gallegos.

12. That Sheriff Espinoza was advised by Mr. Gallegos on July 7, 1987, that on the 3rd day of July, 1987, he, and a person known to him as Dennis Martinez had set fire to Sheriff Pete Espinoza's residence.

13. That according to Mr. Gallegos, he accompanied Dennis Martinez to Herbert Vigil's house where he, Dennis Martinez, siphoned gas from Herbert Vigil's car into a number of bottles.

14. That Sheriff Espinoza was further advised by Mr. Gallegos that he accompanied Dennis Martinez to Sheriff Espinoza's home where Mr. Martinez burned both the garage and home of Sheriff Espinoza by: in the case of the garage, pouring gas on it and lighting it, and in the case of the home by throwing a lighted bottle of gasoline through a window of the home.

15. That on the 21st day of July, 1987, your affiant interviewed William Gallegos at the Alamosa County jail.

16. That during this interview, Gallegos told your affiant that on July 3, 1987, he went to the residence of Rocky Martinez where he met up with Dennis Martinez.

17. That affiant was advised by Gallegos that Dennis Martinez and he had gone to Herbert Vigil's house on the evening of July 3, 1987, and after telling Mr. Vigil of their intentions to

burn the residence of Sheriff Pete Espinoza, took gas with Mr. Vigil's permission from a vehicle owned by Mr. Vigil and filled containers which were intended to be used to burn the residence of Pete Espinoza.

18. That affiant was further advised by Mr. Gallegos that Mr. Vigil then gave both Mr. Martinez and Mr. Gallegos a ride to a point in the vicinity of the home of Pete Espinoza, knowing full well that the intentions of Mr. Martinez and Mr. Gallegos was to burn the residence of Pete Espinoza.

David D. Stong (signature)
Affiant

Subscribed and Sworn to before me this 22nd day of July, 1987.
My Commission Expires: _____ (signature)
Notary Public

MOTION

Douglass F. Primavera, District, District Attorney, within and for the Twelfth Judicial District, State of Colorado, hereby moves that a warrant issue for the arrest of the defendant(s) above named.

By (signature)
Deputy District Attorney #12213

WARRANT

THE PEOPLE OF THE STATE OF COLORADO
TO: any person authorized to execute warrants within the State of Colorado. Greetings:

You are hereby commanded to arrest Herbert Vigil and bring him without unnecessary delay before the County Court in and for the County of Costilla, Colorado to answer a Complaint/Information charging him with First Degree Arson; Conspiracy In violation of CRS 18-4-102; 18-2-201.

Bail fixed by the Court in the amount of $100,000

7/22/87 dated

(Signature)
Judge

STATE OF COLORADO
County_____ RETURN OF SERVICE

I duly served the within warrant by arresting _____ as required thereon on _____,19___

Fees Service _____
Mileage _____
Return _____

(s)_____
Deputy Sheriff

DEFENDANTS
EXHIBIT
3

That in consideration for the agreement by the Office of the District Attorney, 12th Judicial District, in conjuction with the investigation of the suspected arson of Costilla County Sheriff Pete Espinoza's residence on Friday, July 3, 1987, to dismiss formal charges on William Gallegos (DOB 11/26/45) for his involvement in the suspected arson the following conditions must be met:

1. William Gallegos shall cooperate fully with any investigation conducted reference the suspected arson of Costilla County Sheriff Pete Espinoza's residence which is to include full and complete information regarding his own activities and those of Herbert Vigil and Dennis Martinez on the evening hours of July 3, 1987, and morning hours of July 4, 1987, specifically in relation to the arson of Sheriff Pete Espinoza's residence.

2. That William Gallegos shall give truthful and complete testimony regarding all participants in the arson as outlined in paragraph 1 above, as required by Peter L. Comar and the District Attorney's Office of the Twelfth Judicial District.

3. That if William Gallegos does not complete the conditions as outlined herein to the satisfaction of the District Attorney's Office of the Twelfth Judicial District, then all charges resulting from the arson outlined in paragraph 1 above may be prosecuted against him, and any statement obtained as a result of this agreement may be used against him.

4. That should William Gallegos commit perjury, he can and will be prosecuted for same.

5. The parties hereto stipulate that this agreement shall be an exhibit in evidence in any and all proceedings at the option of the Office of the District Attorney for the Twelfth Judicial District.

6. That no other promises have been made by the District Attorney's Office or any other police agency.

This agreement entered into this 21st day of July, 1987, in the County of Alamosa, State of Colorado.

DOUG PRIMAVERA, DISTRICT ATTORNEY

BY: (signature)
Peter L. Comar #12213
Deputy District Attorney

(signature)
Phyllis E. Kline notary public

My Commission expires:
August 29, 1990

APPROVED

(signature)
Bruce Boreson
Attorney for William Gallegos

Filed in District Court
Costilla County, Colorado
(name) , Clerk
_____ , 1987

Filed in County Court
Costilla County, Colorado
Amadeo G. Martinez, Clerk
Jul 23 1987

(Seal)
Office of the District Attorney
12 Judicial District **COMPLAINT / INFORMATION**

THE PEOPLE OF THE STATE OF COLORADO

vs.

HERBERT VIGIL

Defendant(s)

DOUG PRIMAVERA, District Attorney within and for the Twelfth Judicial District of the State of Colorado, in the County of Costilla in the State aforesaid, in the name and by the authority of The People of the State of Colorado, informs the Court that Herbert Vigil on the 3rd day of July A.D. 1987 at the said County of Costilla, State of Colorado, did unlawfully, feloniously and knowingly set fire to, burn and cause to be burned, a building and occupied structure of Pete Espinoza, located at San Pablo, Colorado, without the consent of said victim, in violation of C.R.S. 18-4-102, First Degree Arson. (F-3)

contrary to the form of the Statute in such case made and provided, and against the peace and dignity of The People of the State of Colorado.

DOUG PRIMAVERA
District Attorney

BY Peter L. Comar (signature)
(Deputy) District Attorney #12213

SECOND COUNT: Douglas F. Primavera, District Attorney aforesaid, in the name and by the authority of The People of the State of Colorado, further informs the Court that Herbert Vigil on the 3rd day of July, A.D. 1987 at the said County of Costilla, State of Colorado, with the intent to promote and facilitate the commission of the crime of First Degre Arson, as defined in C.R.S. 18-4-102, as amended, did unlawfully and feloniously agree with Dennis Martinez, that one or more of them would engage in conduct which constitutes said crime and an attempt to commit said crime, and did agree to aid such other person or persons in the planning and commission and attempted commission of said crime, and an overt act in pursuance of said conspiracy was committed by one or more of the conspirators in violation of C.R.S. 18-2-201, Conspiracy. (F-4)

Filed in County Court
Costilla County, Colorado
Amadeo G. Martinez, Clerk
Jul 23, 1987

contrary to the form of the Statute in such case made and provided, and against the peace and dignity of The People of the State of Colorado.

Douglas F. Primavera, District Attorney

By Peter L. Comar (signature)
Deputy District Attorney #12213

STATE OF COLORADO

County of Costilla

David D. Stong, upon oath, says:

That the facts stated in the foregoing information hereto attached, are true and that the offense therein charged was committed of this affiant's own personal knowledge.

David D. Stong (signature)

Subscribed and sworn to before me this 23 day of July A.D. 1987.

Signature
(NOTARY PUBLIC)
(CLERK OF THE DISTRICT COURT)

My Commission Expires:

Filed in County Court
Costilla County
Amadeo G. Martinez
Jul 23, 1987

State of Colorado
ss.
County Costilla

I, the undersigned Clerk of the County/District Court within and for the County and State aforesaid, in the Twelfth Judicial District of the State of Colorado, do hereby certify the within and foregoing to be a full, correct and complete copy of the information filed in said Court in the therein entitled and numbered cause.

WITNESS MY HAND AND THE SEAL OF SAID COURT hereto affixed, this 23rd day of July, A.D. 1987.

Signature
CLERK OF THE COUNTY/DISTRICT COURT

STIPULATION

The Defendant and the Government have agreed and stipulated as follows:

That on July 3, 1987, at approximately 11:15 p.m., Ruben Navarro notified the authorities that the Pete Espinosa home was on fire.

The parties agree and stipulate that the cause of this fire was the application of gasoline to the occupied structure belonging to Pete Espinosa and a match being applied to the gasoline.

They further stipulate and agree that Pete Espinosa did not agree or consent to the burning of his home.

The parties further agree and stipulate that the home is located within Costilla County, Colorado.

(EVIDENCE STICKER)

VICTIM IMPACT STATEMENT

Name of Victim Pete and Judy Espinoza Phone (H) 672-4242
Date of Birth May 15, 1948 Phone (W) 672-3302

Name and Relationship to Victim of Person Filling Out Form

Defendant Herbert Vigil
Docket # 87CR7 Division

1. Please describe the nature of the incident in which you were involved. 1st degree arson – home and garage, firewood and shrubbery

2. As a result of the incident, were you physically injured? If yes, please describe the nature and extent of your injuries. No

3. Did you require medical treatment for your injuries? If yes, please describe the treatment received and the length of time treatment was or is required. No

4. Indicate the amount of expense incurred to date as a result of the medical treatment you received. $ N/A

   Indicate the anticipated expenses you will have to pay for future medical treatment received. $ N/A

5. Were you psychologically or emotionally injured as a result of this incident? If yes, please describe the psychological impact the incident has had on you. psychologically wife and children don't feel safe at home when I'm not there. 5 year old and 8 year old still ask questions like will he come back to burn our house again. 8 year old might have to go for counseling after all. She is very scared, especially at night.

6. Have you received any counseling or therapy as a result of this incident? If yes, please describe the length of time you

have been or will be undergoing counseling or therapy. No - might have to take 8 year old and possible 5 year old. They are still very emotionally distrubed. Some nights when they are going to bed they ask me "Mom what if Indio comes to burn this house down?"

7. Indicate the amount of expenses incurred to date as a result of counseling or therapy? $ 0

Indicate the anticipated expenses you will have to pay for future counseling or therapy $0

8. Have you incurred any other expenses or losses as a result of this incident? If yes, please desribe. Yes. Had to do pipeline, electrical and sewer hookups again. Landscaping has to be done. Will have to build garage, haul more firewood. We had to use gas to keep warm all winter because I didn't have any firewood which is very expensive.

9. Has this incident affected your ability to earn a living? If yes, please describe your employment and specify how and to what extent your ability to earn a living has been affected, days lost from your work, etc. Before becoming County Sheriff I was a roofer by trade. Now, if need be, because of the burning of my tools and material I will not be able to do roofing until tools and material are replaced.

10. Did insurance cover any of the expenses you have incurred as a result of this incident? If yes, please specify the amount and nature of any reimbursement. NO

Insurance Company Allstate
Agent Richard Strause
Address Aeroplaza, Colorado Springs, Colo

Did Crime Victim Compensation pay for any of your expenses? NO
If yes, please specify and nature of reimbursement

11. Was the defendant known to you before this incident occurred?
If yes, please indicate your relationship to him/her.
Yes, he is my cousin.

12. Do you fear reprisals from the defendant? If yes, please explain. Unknown at this time

13. Please describe what being a victim of a crime has meant to you and your family. It has completely shattered our lives. We don't know if to try to replace everything we had for fear it might happen again. Plus all the years a person work for what he has and its all gone in a matter of 3 hours.

14. Are there any special conditions you would like the Court to impose on the defendant (such as no contact with you or your family, psychological treatment, alcohol or drug treatment, community service hours, etc.)? We will just let the Court punish him as the Court sees fit. I'm sure he will get the punishment he deserves.

ADDITIONAL COMMENTS: We had never been victims of such a tremendous crime. Now that we were we know what it's like for other Americans to suffer, and this gives us a clear picture of why Americans are fighting for stricter laws.

Would you like to be present at the sentencing? Yes __X__ No

RETURN TO:

VICTIM - WITNESS ASSISTANCE UNIT
OFFICE OF THE DISTRICT ATTORNEY
426 San Juan Avenue
Alamosa, CO 81101
589-3691
852-5197
274-5888

(303) 843-5858

Castelar M. (Cas) Garcia
Mary Elizabeth (Beth) Garcia

April 4, 1988

Attorneys and Counselors at Law

Honorable O. John Kuenhold
District Judge
Costilla County Courthouse
401 Church Place
San Luis, CO 81152

Filed in District Court
Costilla County, Colorado
(signature), Clerk
_____, 1988

Re: People vs. Herbert Vigil
Costilla County District Court No. 87 CR 7

Dear Judge:

I do not ordinarily communicate with the Court with reference to the interaction between victims and people convicted of crimes. However, in this instance, because of the volatile nature of the situation in Costilla County, I must bring the events of March 31, 1988, to the Court's attention.

After the sentencing, Mr. Vigil was taken to the County Jail by the Costilla County Sheriff's Department. He was being held, while he was attempting to post bond, and the Sheriff went to the jail and started to yell and throw things around. The Sheriff was enraged, because Mr. Vigil had made his bond. Fortunately, that only took twenty minutes, before he was released.

Upon his release, Mr. Vigil went to his home ease of San Luis in the company of his wife and family to close up the home. Upon attempting to leave San Luis, the Sheriff pulled him over and threatened him with violence (he was wearing leaded gloves and had his hand on his gun). The Sheriff made reference to the Sheriff being armed and stated, that he would remove his weapon and take care of Mr. Vigil.

All of these activities terrified Mr. Vigil and his family, consisting of his wife, his children, and his sisters. Mr. Vigil was stopped without cause, quite possibly in derogation of C.R.S. 18-4-403, and because asportation took place in compelling Mr. Vigil in moving his vehicle and person without his consent, and without lawful justification, it could be contrary to C.R.S. 18-3-302 (1). See, also, People v. Unrein, 677 P. 2d 951 and People v. Apodaca, 668 F. 2d 941. Becuase leaded gloves can be considered a deadly weapon, a violation of the Felony Menacing Statute may have occurred.

I am bringing these matters to the Court's attention, because of my fear that other acts may be committed against Mr. Vigil in derogation of the law.

I am forwarding a photocopy of this letter to the District Attorney to advise him of my communication with the Court.

Yours Truly,

(signature)

CASTELAR GARCIA
Court Appointed Attorney
for Herbert Vigil

PC: Peter Comar
Office of the District Attorney
426 San Juan
Alamosa, CO 81101

Herbert Vigil
2519 Main
Colorado Springs, CO 80907

EXCERPT OF SHERIFF'S TESTIMONY

A: Yes, he (Vigil) denied having been involved, yes, sir.
Q: And you indicated that you had had a statement from Mr. Gallegos?
A: Yes, sir.
Q: And that you elected to believe Mr. Gallegos?
A: Sir, Mr. Gallegos and myself, we have been, up to the day that my home was burned, William Gallegos and myself were the best of friends. As a matter of fact, when he got stabbed, I saved his life by bringing him to the hospital in Alamosa before he bled to death and an ambulance picked him up. When he was 13 years old and I was 12 years old, I don't think there was a day in our lives that we were really apart. I know William just as much as he knows me. As a matter of fact, I spent more time with William Gallegos than I did with my own brother.

Q: Mr. Espinoza, if one were to walk from your home to Dennis Martinez's home in La Valley, how long would it take?
A: There's about three routes, sir.
Q: Take your choice; give us all three.
A: If you were to walk through the highway, it would probably take a man walking 55 minutes or maybe even more. It's three and a half miles. A way more than an hour.
If he were to take the route jumping fences and through the ranches, it would probably take a person two hours.
Q: Is it pretty rugged and rocky through the ranches?
A: Yes, sir, it is.
Q: And lots of fences?
A: Yes, sir.

EXCERPT OF DENNIS MEDINA'S TESTIMONY

Q: Could you state your name and address?
A: Dennis Medina; Star Route Box 58, San Pablo, Colorado.
Q: Do you know William Gallegos?
A: Yes.
Q: Did you have occasion to run into him late the night of July 3rd or early the morning of July 4th?
A: Yes.
Q: About what time?
A: Well, I arrived at the bar about 11:00. It was about 11:30 or close to 11:00 when I had a little trouble with him.
Q: Do you know exactly what time it was?
A: About 20 to 12:00.
Q: That is an approximate time, isn't it?
A: About 11:45. About that time.

Q: When did you first notice him?
A: About 20 minutes after I had been in there.
Q: What did you notice about him?
A: He was sitting at the bar talking to the bartender and everybody there.
Q: Did anything happen?
A: Well, not right away. I was talking to some people there, and he came up to me; and I shook his hand. After a while, I just got popped in the face. I didn't go down; I went back like this and went down for his right leg and put him down on his back. I told my friends, "Let's go home."

EXCERPT OF GALLEGOS' TESTIMONY

Q: Where did you go after you lit Sheriff Espinosa's house?
A: We ran south until we hit that road going on the north side of La Valley toward the mountains. Then we ran east and up to Dennis's property. And then we walked out south.
Q: Where did you go?
A: We went to where Dennis had a white Falcon. Then we came to the Covered Wagon on it.
Q: Did you meet anybody at the Covered Wagon?
A: Yes. When I walked in the Covered Wagon I met Josito Espinoza. He bought me a beer. I turned around and the first thing I saw was Dennis Medina's face, the boy that had broken into my house. I was then pretty angry at him because of what he had done, what he had caused me to do. I walked toward him, and I punched him in the face.

Q: About what time did you get there? Do you remember?
A: I don't remember.
Q: Did you run most of the way?
A: I'm pretty sure we did.
Q: Was it difficult running?
A: Yes, it was.
Q: Why is that?
A: There was ditches and some irrigated fields. We tried to find the best way to run on. It was difficult, but we ran.

A: We walked or ran.
Q: Walked to Augustine Rodriguez's?
A: We walked from Augustine Rodriguez's to Pete Espinosa's house; and then we walked and ran from Pete Espinosa's house toward Dennis's house.
Q: Toward wherever you left the car?
A: To wherever Dennis had left the car, yes.
Q: And then you went on to the Covered Wagon?
A: Yes.

Q: Then I asked you if you went back to where you and Dennis had left the car; and you said yes.
And I said: You don't really remember where that happened. Do you remember that?

A: The car was parked there. I had no idea where it was parked until we walked up there.

Q: And you then got into the car and drove in to the Covered Wagon?

A: Yes.

Q: How long does it take to drive from where Pete's house is to the Covered Wagon?

A: I'm not sure.

Q: Fifteen minutes?

A: Approximately.

Q: It takes a little more to drive that distance from Dennis' house, doesn't it?

A: From Dennis' house to where?

Q: To the Covered Wagon.

A: I would say you are bringing up to—

Q: —To where the car was. You said you had gone back to Dennis' on one occasion.

A: Yes, after the fire. And we got on Dennis' car and took off to the Covered Wagon.

Q: And that took what? Twenty minutes? Thirty minutes?

A: I'm not sure. Approximately 15 to 20 minutes.